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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 197.

GEORGE MARSHALL, *Petitioner,*

v.

UNITED STATES OF AMERICA.

No. 236.

RICHARD MORFORD, *Petitioner,*

v.

UNITED STATES OF AMERICA.

BRIEF AMICUS CURIAE OF THE NATIONAL LAWYERS GUILD.

NATIONAL LAWYERS GUILD,
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STATEMENT.

The National Lawyers Guild, a bar association with a nationwide membership, is pledged by its charter "to protect and foster our democratic institutions and the civil rights and liberties of all the people." It is vitally interested in legal principles which have important impacts on civil liberties. The legal principles in the cases at bar, as

in the other cases flowing out of hearings of the House Committee on Un-American Activities, directly involve "the civil rights and liberties of all the people." Unless there is reversal of the principles established by the lower courts in these cases, our civil liberties are truly endangered. The National Lawyers Guild has, accordingly, secured the consents to the filing of this brief of the attorneys for the parties herein.

Constitutional issues similar to those involved in the instant cases have been the subject of petitions for writs of certiorari previously presented to this Court. In connection with those petitions, the National Lawyers Guild has filed briefs amicus curiae; these briefs have set forth the basis for the Guild's concern with the issues which the pending petitions again present. It is a concern which increases, as the number of cases growing out of hearings of the House Committee on Un-American Activities increases, and as the restrictive effects of the actions of this Committee on the civil liberties of the people becomes increasingly apparent. Because of this growing concern, we are impelled to submit this brief amicus curiae.

ARGUMENT.

I.

The Resolution Creating the House Committee on Un-American Activities is Unconstitutional, Being an Abridgement of the Rights Guaranteed by the First Amendent.

We are aware of the traditional reluctance of the Courts to interfere with the functioning of the legislative branch of the government. However, the Courts have recognized that it is their duty to intervene, where circumstances require, to prevent Congress from depriving citizens of their basic rights, not only when the deprivation arises from Congressional use of its legislative power, but also when it is the result of Congressional use of the investigatory

power. *Kilbourn* v. *Thompson*, 103 U. S. 168, 181; *McGrain* v. *Dougherty*, 273 U. S. 135, 176; *Jurvey* v. *McCrackin*, 294 U. S. 125. We respectfully submit that the instant cases present circumstances which clearly call for the intervention of the Courts.

The First Amendment is an absolute prohibition against Congressional interference with the right of freedom of speech, press and assembly. It contains no escape clause, It does not say Congress shall not abridge freedom of speech, except "subversive" speech, or "un-American" speech, whatever these adjectives may mean. Nor does the First Amendment permit round-about, devious means of defeating its purpose. The argument that Congress by investigation may abridge freedom of speech, although it cannot by law, an argument which has been used to sustain the validity of the House Resolution, smacks of such deviousness. The power to investigate is no more than a means, an instrumentality for securing effective legislation. It is an implied right, only incidental and auxiliary to the right of Congress to legislate (*Barry* v. *United States, ex rel. Cunningham*, 279 U. S. 597, 613; *Marshall* v. *Gordon*, 243 U. S. 521, 541; *Sinclair* v. *United States*, 297 U. S. 263, 291). To say that this incidental right gives Congress greater power than it derives from the Constitution is indeed to achieve an illogical and topsy-turvy result.

In considering that the First Amendment makes no specific reference to Congressional investigations, it must be borne in mind that when the First Amendment was adopted, Congress had not yet asserted its claim of power to conduct investigations in aid of legislation. (*Kilbourn* v. *Thompson, supra.*) It must also be borne in mind that originally the substance of the First Amendment was not inserted into the Constitution because of the assumption of its framers, expressed by Alexander Hamilton, that freedom of speech, press and assembly was absolute, subject to no restraints, no restrictions, and needing no specific Constitutional protection.

We must conclude that the First Amendment prohibition against public inquiry into matters falling within its realm, (*United States* v. *Ballard*, 322 U. S. 78; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624), is a limitation on Congressional investigatory power, as well as on its legislative power (cf. *Colonial Sugar Refining Co.* v. *Attorney General*, 15 Commonwealth L. R. (1914) App. Cas. 237; *Greenfield* v. *Russell*, 292 Ill. 392, 127 N. E. 105). We are bolstered in this conclusion by the decisions of this Court, giving a preferred place to the protections afforded by the First Amendment.

That the Congressional investigatory power can be a means of restraining free speech has been amply proved by the Resolution here being considered, and by the history of its administration by the House Committee on Un-American Activities. The very fact that the subject matter for investigation under this Resolution is a type of "propaganda activities" makes its validity suspect, for that which normally falls within the ambit of propaganda activities is the very thing entitled to the protection of the First Amendment. The Court of the Appeals for the District of Columbia, in the process of upholding the constitutionality of the Resolution, has indicated that it is a restraint upon freedom of speech. *Barsky* v. *United States*, 167 F. 2nd 241. The limitations upon freedom of speech resulting from the investigations conducted by the House Committee on Un-American Activities pursuant to the Resolution have been shown in many briefs presented to this Court, by the National Lawyers Guild, as well as by others, and we shall not repeat the facts therein contained. (Cf. Brief submitted in support of petition for certiorari in *Barsky et al.* v. *U. S.*, October Term, 1947, No. 766, and *Josephson* v. *U. S.*, October Term, 1947, No. 535).

Where the abridgement of the rights guaranteed by the First Amendment is clear, as here, the Supreme Court has the duty to consider whether there is any constitutional

warrant for that abridgement. We submit that no warrant exists.

II.

The Resolution Violates the Fifth and Sixth Amendments.

The Resolution authorizes an investigation into "un-American propaganda activities", and "subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution. . . ."

To meet the constitutional requirements of due process a criminal statute must have definiteness and certainty. *Lanzetta* v. *New Jersey*, 306 U.S. 451; *Winters* v. *New York*, 333 U.S. 507; *Kraus & Bros.* v. *United States*, 327 U.S. 614. While the indictments in the instant cases were brought under Section 192, Title 2 of the United States Code, Section 192 has no meaning unless the Resolution is by reference made a part of it. Therefore, the Resolution must conform to the same standards of definiteness as must a penal statute. *Kraus & Bros.* v. *United States, supra.*

An examination of the Resolution reveals that the key phrase, repeated both in subclause (i) and subclause (ii), is "un-American propaganda activities." This key phrase, used by itself in subclause (i), has no ascertainable meaning. Cf. *Barsky* v. *United States, supra.* The phrase "subversive and un-American propaganda" used in subclause (ii) must fail of definitness because of its inclusion of the phrase "un-American propaganda"; it does not gain precision by the inclusion of "subversive" but becomes more meaningless, since the latter word has no definable content. Cf. *Winters* v. *New York*, 333 U.S. 507.

Nor is definiteness supplied by the addition of the phrase "the principle of the form of government as guaranteed by our Constitution," in subclause (ii). What is *the* principle to which reference is made? Is there only one? If more than one, which one is meant? A person faced with threat of criminal sanctions should not be required to play guessing games, yet this Resolution compels such guesswork.

The Court of Appeals for the District of Columbia, considering this Resolution, attempted to supply meaning to it by saying that the use of the phrase last quoted lent content to the words "subversive and un-American". But in the very course of this discussion, it found itself referring to *"the principles"* underlying the form of the existing government, *"the principles"* of the Constitution, *Barsky* v. *United States,* 167 F. 2d 241, a tacit admission of the impossibility of talking in terms of a single principle as *"the principle"*. Cf. *Schneiderman* v. *United States,* 320 U.S. 18.

Under this Resolution, because of its vagueness, the Committee administering it has felt free to inquire into anything it chose, anything which at the moment incurred its displeasure. For these excursions, with their incalculable harm to civil liberties, the Resolution must bear fault equally with its administrators.

The Resolution, which carries with it the threat of criminal sanctions, since it becomes part of 2 U.S.C. 192, is both in its entirety and in each of its subclauses so vague and indefinite that it fails to meet the due process requirements of the Fifth and Sixth Amendments to the Constitution.

CONCLUSION.

Great issues are at stake. The right to speak freely, the right to be free from Congressional investigation into opinions of private citizens, the right to hold opinions without expressing them publicly, are among those involved in these cases. Their importance cannot be gainsaid. The legal questions arising in these cases have not yet been authoritatively answered. The freedom from jail of many people, and the freedom to speak of many millions, depend on these answers. For the benefit not only of the petitioners, but for the benefit of all of our citizens, this Court should hear

and determine the vital issues herein being presented to it. We urge that the petition be grantd.

Respectfully submitted,

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